SUPREME COURT, U. S.

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 611

MISSISSIPPI POWER & LIGHT COMPANY,
Appellant,

vs.

CAPITAL ELECTRIC POWER ASSOCIATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

MOTION TO DISMISS APPEAL

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

MOTION TO DISMISS APPEAL

Appellee moves the Court to dismiss the appeal herein on the following grounds:

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE APPEAL.

I. THE RECORD

By permission of the Supreme Court of Mississippi the original record in that court has been certified and sent up to this Court as the record on this appeal. The record is in 12 volumes, numbered I to XII, inclusive. In keeping with the rules of this Court and for convenience the record will be cited by volume and page, thus: "R. I, 1", meaning "Record, Volume I, page 1", etc.

NOTE: Inasmuch as the original record of the Mississippi Supreme Court is now on file in this Court (and was so filed before Appellee received a copy of the Jurisdictional Statement) and is not available to Appellee, it will be impossible for Appellee when referring to an exhibit herein to give "the page number at which the exhibit appears and at which it was offered in evidence" as required by Rule 40-2 of this Court; but the citation will show where the exhibit is found in the Record (taken from briefs in the State Court); and in all other respects citations to the Record will be in accordance with said Rule 40-2 of this Court.

II. APPENDICES

Appendices to the Jurisdictional Statement herein include copies of documents which are appropriately before the Court in this form and will not be duplicated in this motion. They will be referred to herein where appropriate. For convenience the reference will be "App. A., P. 1", meaning "Appellant's Appendix, Page 1", etc.

For reasons which will hereinafter appear copies of Sections 1, 4, 5, 6, 22, 26 and 28 of the Public Utility Act of 1956 (Chapter 372, Mississippi Laws of 1956; Section 7716-01, *et seq.*, Volume 6, Recompiled, Mississippi Code of 1942) constitute Appendix 1 hereto.

III. QUESTIONS PRESENTED

Appellant's statement of the questions presented is incomplete and misleading. It implies that Appellant built a system to operate and operates in the City of Jackson and its suburbs only; whereas Appellant built facilities to operate and operates in 46 of the 82 counties of the state. It also assumes that when under the Public Utility Act of 1956, Appendix 1 hereto, the State granted to Appellee an exclusive Certificate of Public Convenience and Necessity (based on prior service rights) to serve the area in suit it thereby "impaired" contract characteristics of corporate charters granted in 1860 and 1888 to which Appellant claims ownership at this time; and limits the question to the state's right to "impair".

A more accurate statement of the questions presented would be:

1. Whether the Certificate of Public Convenience and Necessity issued to Appellee by the State Public Service Commission September 21, 1959, under the provisions of the Public Utility Act of 1956 (which certificate carries exclusive service rights, except under some circumstances not relevant here) if sustained would have the effect of impairing contract characteristics of the charters of 1860 and 1888?

2. If so, was such impairment brought about by a permissible exercise of the police power of the State so that the protection of the impairment of contracts clause of the Federal Constitution would not be applicable thereto?

IV. STATEMENT OF THE CASE

1. Preliminary Statement

This case reached this Court by these steps: (1) Appellee, an electric utility, filed a petition for a cease and

desist order against Appellant, another electric utility, before the Mississippi Public Service Commission (Commission) alleging an unlawful invasion of Appellee's certificated service area by Appellant; (2) the Commission after hearing granted the cease and desist order; (3) Appellant appealed to the Chancery Court of Hinds County, Mississippi (Chancery Court), the intermediate court of appeals, and that Court affirmed; (4) Appellant appealed to the Supreme Court of Mississippi (Mississippi Court) and that Court affirmed; and (5) Appellant appealed to this Court on an alleged constitutional question.

2. The Act

Prior to enactment of the Public Utility Act of 1956, effective March 29, 1956 (Chapter 372, Mississippi Laws of 1956; Section 7716-01, *et seq.*, Volume 6, Recompiled, Mississippi Code of 1942), herein called the "Act", electric public utilities were not regulated by the Commission or any other state agency (although required to obtain municipal franchises to operate within municipalities). That Act brought them under the exclusive original jurisdiction of the Commission for regulation in respect of all of their "intrastate business and property" subject to certain exceptions not material here (Section 7716-04, Volume 6, Recompiled, Mississippi Code of 1942) (A. A1, A3).

The Act recognized prior service rights and granted unto each electric utility (as well as water, gas, telephone, etc., utilities) upon timely application being made and without proof that the public convenience and necessity would be served thereby the right to a Certificate of Public Convenience and Necessity (usually called a "grandfather certificate") to continue serving the areas being served by it on and prior to the effective date of the Act. These certificates were provided for on an *area* basis, not a facility basis.

3. Legal Status of Parties

Appellant and Appellee were each and both included in the definition of a "public utility" contained in the Act and each and both were made subject to the terms and provisions of the Act and the jurisdiction of the Commission (Sections 1 and 4 of the Act; A. A1, A3).

The parties may be further identified as follows:

1. Appellee is a corporation organized and operating under the Electric Power Association Act of Mississippi (Chapter 184, Mississippi Laws of 1936, as amended; Section 5463, *et seq.*, Volume 4A, Recompiled, Mississippi Code of 1942) and by the terms and provisions of said Act and its charter is vested with full, plenary and unrestricted authority to render electric service of every kind and character, residential, commercial, industrial and other, both within and without municipal and urban areas of all sizes.

2. At the commencement of litigation Appellant was a foreign corporation under the laws of the State of Florida but authorized to do business in Mississippi (has since obtained a Mississippi charter) and operates in an area located generally in the west half of the state. While its Florida charter is not in the record nor has its authority under the laws of Florida been established in the record it may be assumed for present purposes that at all relevant times its statutory and charter authority was and still is as broad as that of Appellee.

This identification is given in view of the fact that in various pleadings Appellant has implied that there is some sort of difference (favorable to Appellant) in the legal status, rights and public responsibilities of the two utilities. Such is not the case.

4. The Facts

The area in suit (disputed area) is a body of land in Hinds County, Mississippi, about one mile long east and west and three-fourths mile wide north and south. In 1888 it lay west of the City of Jackson about two miles at the nearest point, three miles at the farthest; in 1921 the closest part was one mile, the farthest two miles; in 1925 the closest point was one mile, the farthest one and one-half miles; in 1949 the City expanded and touched the east boundary of the area but did not take in any part of it, the farthest point still being one mile away; and on March 17, 1960, the City expanded and annexed the disputed area (and other areas roundabout) (R. VIII, 986, *et seq.*; Exh. 14 at 987).

In 1939 Appellee built lines into the disputed area (a rural area) and served three small residences, they being the only houses in the area at the time. It held itself out to the public as offering its services to all who desired them. It added facilities and rendered services as needed so that when the Act was adopted in 1956 it had 134 services in the area, and when the petition was filed October 4, 1960, it had more than 200 services therein (the area having developed with small residences and small commercial establishments) (Petition, R. I, 4, *et seq.*; App. A, 28).

Neither Appellant nor any other electric utility has ever served the disputed area or any part thereof (except for six scattered services around the edges connected by Appellant sometime before the Act was adopted in 1956 and which were "frozen" by agreement of the parties and the Commission's order of September 21, 1959, in Docket U-84, Appellee's "grandfather application", this being the method adopted by the Commission and applied in all cases

to deal with one or more "stray" services of a utility located in the "grandfather service area" of another utility, the predominant server of the area. (App. A. 24, 25, 28).

During the period 1956-1959 at the request of the Commission the two utilities set about to "identify" as best they could service areas to which they would be entitled respectively under their established rights, including rights under Section 5(b) of the Act, the so-called "grandfather clause". They were able to reach full agreement in this respect whereupon they made maps (by counties) identifying such areas, initialed the maps and filed them with the Commission. The pertinent map here was of Hinds County. That map identified the disputed area as an area to which Appellee had grandfather rights and both utilities recommended that the area be certificated to Appellee along with its other service areas in seven counties of the state.

The disputed area had been claimed by Appellee as grandfather service area in its application, Docket U-84. At first Appellant filed a sort of generalized protest on that cause (no particular or specific objection with respect to the disputed area) but that protest was later withdrawn and the disputed area was certificated to Appellee without objection under the Commission's order dated September 21, 1959.

Appellant obtained a "grandfather certificate" under its application to the Commission, Docket No. U-44, issued November 19, 1959, in which its certificated service area was, like that of Appellee, described by metes and bounds. It included all of the area in the City of Jackson and much territory roundabout which had been served by Appellant prior to adoption of the Act in 1956, but did not include any part of the disputed area.

Following annexation of the disputed area to the City of Jackson March 17, 1960, in May, 1960, Appellant built a line into the area and commenced rendering services. Other lines were built and other services rendered so that by July, 1964, Appellant had connected 19 services in the area (App. A. 7). By this time Appellee had approximately 241 services in the area (App. A. 7).

Appellant's lines duplicated at all points those of Appellee already in place (R. VI, 807, Exh. 1; R. I, 19, Exh. "A" to Petition).

Appellant did not obtain a Certificate of Public Convenience and Necessity from the Commission for such construction or services nor did it obtain the permission of Appellee.

The petition for cease and desist order ensued.

In the early stages Appellant did not plead the old charters of 1860 and 1888 in defense but relied on its municipal franchise and a water pumping agreement with the municipality to support its answer and cross petition (by which it sought to have Appellee remove all of its facilities and surrender the area to Appellant entirely). However, two state supreme court decisions rendered during the pendency of the cause (*Delta Electric Power Association v. Mississippi Power & Light Company*, 250 Miss. 482, 149 So. 2d 504 [1963] and *Capital Electric Power Association v. Mississippi Power & Light Company*, 250 Miss. 514, 150 So. 2d 534 [1963], on joint petition, cert. den. 375 U.S. 77; reh. den. 375 U.S. 981) rendered Appellant's answer and cross petition unavailing, and they were stricken.

Thereupon Appellant filed an amended answer and pleaded the old charters to support a claimed exclusive

right to serve the area; but later reduced its claim to a "joint" right with Appellee to serve in the area, this concession being made in briefs, not pleadings.

As aforesaid the Commission granted the Cease and Desist Order; the Chancery Court affirmed; and the State Supreme Court affirmed.

V. ARGUMENT

1. There Has Been No Impairment of the Obligations of a Contract

The charter of Jackson Gas Light Company was granted February 10, 1860 (R. V, 628, *et seq.*; App. A., P. 38, *et seq.*), simply incorporating existing "gas works" in Jackson, no authority being granted to engage in the electric business. The charter was amended March 7, 1888, to authorize electric service in Jackson (R. V, 630, *et seq.*; App. A., P. 40, *et seq.*). The amendment included an easement ". . . it is fully authorized and empowered to erect poles along and through the streets and alleys of said City on which to suspend its wires, lamps and other appurtenances, . . .".

The charter of Light, Heat and Water Company was granted February 23, 1888 (R. V, 632, *et seq.*; App. A., P. 41, *et seq.*), giving authority ". . . to sell such light . . . in the City of Jackson and its suburbs; . . ." and carried the easement provision "That the right-of-way over all of the streets and alleys of the City of Jackson, and the public roads adjacent thereto is hereby granted said company for its pipes, wires, poles and appliances for the purposes aforesaid . . .".

The Commission excluded the old charters from consideration altogether and the Mississippi Court affirmed. The Court was correct in doing so because:

(a) The said charters did not grant any rights whatever with respect to the disputed area which lay not within the City of Jackson or its suburbs but several miles away in purely rural area constituted of swamps, woodland, pastures and cultivated fields (and areas in between were of similar character).

(b) The Legislature in granting the said utilities operating rights in the City of Jackson in 1888 and by granting unto the City (by means of general statutes) authority from time to time to extend its corporate boundaries did not thereby divest itself of power and authority to grant rights to petitioner with respect to the disputed area at a time (1956) when it lay outside the municipality; and, the exercise by the City of the authority to extend its corporate limits in 1960 did not have the effect of canceling the rights granted by the Legislature to petitioner in 1956.

(c) Even if Appellant had acquired service rights in the disputed area in 1888 (which is certainly denied and respondent *doesn't even claim* any such rights except following extension of the corporate limits in 1960) those rights would have long since been abandoned and lost because Appellant not only did not serve the area but stood by and acquiesced in Appellee's serving it from 1939 to 1960, a period of 21 years, without protest or objection, and in so serving it, Appellee necessarily invested large sums in distribution facilities therein and acquired more than 200 valuable service contracts therein under circumstances and conditions justifying its belief that it would serve the area indefinitely.

(d) If in 1959, when the service area agreement was being worked out between Appellee and Appellant (three years of hard work went into this undertaking with fruitful results) Appellant had any shadow or color of right to serve

in the disputed area stemming from the old charters (which of course is denied), it was not because of the right to "sell such light . . . in the City of Jackson" for the area was not in the City of Jackson and never had been. Thus it would have had to have been because of the right to "sell such light . . . (in) . . . its suburbs." By *agreeing* that the area should be certificated to Appellee and in a *sworn* petition *representing such* to the Commission in Docket U-399 and by withdrawing its objections to Appellee's grandfather application, Docket U-84, and consenting that the area be certificated to Appellee, Appellant thereby unequivocally agreed that it had no such rights therein.

Whether this took the form of agreeing that it had never had any such rights stemming from said old charters (which seems manifestly to have been the case) or agreeing that any such right as it may ever have had had long since been abandoned while it stood silently by and acquiesced in Appellee's serving the area from 1939 to 1959 is immaterial. One is as effective as the other.

Taking these points then, one at a time, and developing them further:

1. As to "(a)" above, no one will deny that in 1888 the disputed area was not even near the City or its suburbs. The evidence on this is undisputed. It was provided by the testimony of: Professor F. M. Coleman, a hardy man in his mid-seventies who has resided in the vicinity of the disputed area from 1915 to date, was County Superintendent of Education in Hinds County from 1916 to 1936 and has had valuable farming interests in this general vicinity all of these years; Mr. Earl L. Phillips, Manager, Capital Electric Power Association from its organization in the late 1930's to date (a Hinds County planter earlier), who has known the area intimately since 1921, and Mr. W. W. Sikes,

an engineer who provided map exhibits and other data showing the western boundaries of the City of Jackson at various dates through the years and other technical information.

Such evidence may be briefly summarized as follows:

In *1888* the disputed area lay west from the City of Jackson two miles as to the closest part and about three miles as to the farthest; in *1921* as to the closest part it was one mile and as to the farthest, two miles; in *1925* as to the closest point it was one-half mile and as to the farthest, one and one-half miles; in *1949* the City expansion touched it on the east side but did not include any part of it, the farthest part thereof remaining one mile distant; and in *1960* the City expansion took in the disputed area (and other area roundabout) (R. VIII, 986, *et seq.*; Exh. 14, at 987).

As to the nature of the area: In *1915* it was woodland and farming land; there was one residence either within or near the disputed area facing the railroad; there was a farm in the disputed area which later became a dairy farm; the disputed area could be reached from Jackson as to only a part thereof by road in 1915 and for years afterward and then only by a "dry weather" dirt road; even into the 1920's and later the road was "nearly always" impassable in winter months; there was a swampy area and a creek which could hardly ever be crossed in winter with "horse and buggy"; people out in that general area usually came to Jackson on the train; between the disputed area and Jackson was wooded open country with just a few "little shanties" occupied as residences; this condition remained about the same until Highway 80 was cut through about 1938 and opened about 1940 whereupon some development began, but the area was still one-half mile at the

closest point and one and one-half miles at the farthest point away from the city limits for another ten years or so (Test. Coleman, R. IX, 1131-1136).

Turning to the testimony of Mr. Earl L. Phillips: In 1921 the disputed area and the area lying between it and the City of Jackson was wooded area, farm and pasture lands; there was no Highway 80 (it was not even roughed out until 1939); there were no roads other than a fair weather road, that is, a dirt road on the north side of the railroad which turned north and crossed a creek on the way to town and there was something of "a trail" leading westerly from Campbell College but to what and how far is not shown; there were one or two small houses between the disputed area and Campbell College (then a one building school in a rural area), a distance of one and one-half miles; the only other buildings either in the disputed area or between it and Jackson were two farmhouses, only one of them being in the disputed area. Between that time and 1939 there were three shacks built "back in the field" in the disputed area; they were served by petitioner in 1939 and one of the farmhouses was served in 1940; after Highway 80 was opened about 1940, the disputed area began slowly to develop primarily as a residential area (Test. Phillips, R. VII, 974-980).

As to the testimony of Mr. Sikes: As already stated, his was engineering work and the distances, etc., set out above were obtained from his work.

The foregoing evidence is undisputed. It is apparent before even referring to a definition of "suburbs" that we have no problem about suburbs. As Professor Coleman said when learned and adroit counsel opposite, on cross-examination, tried to get him to concede that he lived in Jackson's suburbs:

Q "You considered that you lived in Jackson?"

A "No, sir."

Q "Or in its suburbs?"

A "No, sir. When I moved out there I was completely, distinctly separated from Jackson. I didn't ever dream that I would live in Jackson."

Q "You just shopped in Jackson?"

A "That's right. . . ." (R. IX, 1138).

It is apparent that the disputed area was not a "suburb" of the City of Jackson at any relevant time. The authorities are well summarized in cases cited below.

Webster's New International Dictionary, Second Edition, defines "suburb" thus:

"1. An outlying part of a city or town; a smaller place adjacent to a city. In *pl.* with *the*, the residential region or districts on the outskirts of any city or large town; as, to live in, or have branch stores in, the *suburbs*.

"2. *pl.* The confines; the periphery; the environs."

The discussion of the term "suburbs" contained in the case of *Holguin v. Villalobos*, Tex. Civ. App., 212 S.W. 2d 498 (1947), is very enlightening. That case involved a suit by Villalobos against Holguin and others to enjoin the defendants from the continued operation of any motor vehicle transporting passengers for hire over any public highway between the city limits of the city of El Paso and the towns of Ysleta, Socorro, San Elizario and Clint, Texas, and all points in between, until and unless the defendants should procure a Certificate of Convenience and Necessity from the Railroad Commission of Texas. The plaintiff was, and had been for many years, the owner of a Motor Bus Certificate of Convenience and Necessity to operate a bus line between the city and towns named. The defendants defended on the ground that they were

operating a taxicab service wholly within the corporate limits of the City of El Paso *and the suburbs thereof* and thus were not subject to regulation by the Railroad Commission, inasmuch as they came within the exception provided in Section 1(c), Article 911a, Vernon's Civil Statutes, to wit:

> "... provided further, that the term 'Motor Bus Company' as used in this Act shall not include corporations or persons, their lessees, trustees, or receivers, or trustees appointed by any court whatsoever; insofar as they own, control, operate, or manage motor propelled passenger vehicles operated wholly within the limits of any incorporated town or city, *and the suburbs thereof*, whether separately incorporated or otherwise." (Emphasis added).

The only "special issue" (a statutory mode of procedure in Texas) before the jury in the trial court was whether "the defendants operate their motor propelled vehicles wholly within the limits of the City of El Paso, Texas, and the suburbs thereof?" To this issue the jury answered "No"—meaning the operation extended beyond suburbs—and the court permanently enjoined the defendants from operating between the city limits of the City of El Paso and the other points mentioned.

In its opinion affirming the trial court's judgment, the Court of Civil Appeals stated in part as follows:

> "Webster's New International Dictionary defines a suburb to be:
>
> "'An outlying part of a city or town; a smaller place adjacent to a city.'
>
> "This meaning seems to be well and commonly understood. The City of El Paso, like any other city or town, is comprised of the urban inhabitants of one area within, or within and without the corporate limits. If the inhabitants of a larger municipality ex-

tend themselves so as to join up with, or make an adjoiner with, a smaller community whether incorporated or not the latter is said to be a suburb of the former, as is also the urban territory adjacent to an incorporated town or city. Under such definition and understanding communities separated by rural farming areas cannot be suburbs one of the other. The Supreme Court long ago attached much meaning to a town or city, saying the term carries with it the idea of a considerable aggregation of people living in close proximity. A town population is distinguished from a rural population, which is understood to signify a people scattered over the country, and engaged in agricultural pursuits, or some similar avocations, requiring a considerable territory for its support. A section of country so inhabited cannot be called a town, nor treated as a part of a town, without doing violence to the meaning ordinarily attached to that word. State ex rel. v. Edison, 76 Tex. 302, 13 S.W. 263, 264, 7 L.R.A. 733. To the same substantial effect is the language found in the City of Denver v. Coulehan, 20 Colo. 471, 39 P. 425, 27 L.R.A. 751; the legal as well as the popular idea of a town or city in this country both by name and use is that of oneness, community, locality, vicinity; a collective body, not several bodies; collective body of inhabitants; that is, a body of people collected or gathered in one mass, not separated into distinct masses, and having a community of interests; because residents of the same place, not different places. So as to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or continuity, not separation or segregation. So, we conclude the outlying towns and communities from necessity and common understanding cannot be suburbs or parts of the City of El Paso but are separate and apart from it."

The Court of Civil Appeals subsequently granted a motion for rehearing, set aside its judgment and reversed and remanded the case for the sole reason that the trial court's judgment restricted the defendant to operating

within the city limits of El Paso regardless of whether any of the highways in question ran through any suburbs of that city, but its latter decision in nowise altered the portion of its opinion quoted above.

On the appeal of that case (*Villalobos v. Holguin*, 146 Tex. 474, 208 S.W. 2d 871 [1948]), the Supreme Court of Texas concurred with the trial court and the Court of Civil Appeals that the towns mentioned and the areas in between were not suburbs of the city of El Paso, and in its opinion used the following language:

> "There has been much controversy in this case as to the meaning of 'suburbs' as used in Sec. 1(c) [Art. 911a, Vernon's Civil Statutes]. Respondents argue that since they have a taxi license from the City of El Paso, they can lawfully operate from El Paso to Ysleta, Socorro, San Elizario and Clint and through all the territory between those villages because all those areas are suburbs of El Paso. We overrule that contention.
>
> "One authority holds that since the statute does not define suburbs, the courts are left to give the word its 'usual, familiar, and generally understood meaning, as used in everyday life'. Then it points out that the use of the word in our statutes is not new, for we have it used and well defined and understood in urban homesteads and other laws, and defines the term as *an outlying part of a city or town, a smaller place adjacent to a city*. Wood v. Del Rio Motor Transp. Co. et al., Tex. Civ. App., 27 S.W. 2d 874, 875, 876. *A suburb of a city is an outlying part of it, which may be used for business or for residential purposes or for both*. Rowland v. City of Greencastle, 151 Ind. 591, 362 N.E. 474. It is an outlying district which is adjacent to the city and convenient for use as a place of residence for those who work in the city. Piedmont Cotton Mills v. Georgia Ry. & Electric Co., 141 Ga. 129, 62 S.E. 52, 60 C.J., p. 982. *The word 'suburbs' signifies the outskirts of a city to live in or have branch stores*,

in Webster's New International Dictionary, 2d Ed. The testimony shows that the areas between Ysleta, Socorro, San Elizario and Clint consist of farm lands and that there are a number of small farms and a few large ones in the area between Ysleta and El Paso. Under those circumstances we have no difficulty in reaching the conclusion that Ysleta, Socorro, San Elizario and Clint and the territories between those villages are not suburbs of El Paso. We conclude also that as respondents operate out of El Paso toward Ysleta the suburbs of El Paso end where the first farms begin. When they reach farms they find a rural population, which is understood to signify a people scattered over the country, and engaged in agricultural pursuits, or some similar avocations, requiring a considerable area of territory for its support. A section of country so inhabited cannot be called a town, nor treated as part of a town, without doing violence to the meaning ordinarily attached to that word." (Italics ours) State v. Edison et al, 76 Tex. 302, 13 S.W. 263, 264, 7 L.R.A. 743." (Emphasis added)

Accord: *Reddit v. Nueces Transportation Co.*, 224 S.W. 2d 290 (Court of Civil Appeals, Texas, 1949).

Quite obviously, the disputed area which was undeveloped, and the undeveloped lands lying between it and the City of Jackson in the instant case were less likely to be considered "suburbs" of the City of Jackson than the areas in the *Villalobos* case were to be considered "suburbs" of the City of El Paso.

2. As to "(b)" above: In 1888, the Legislature granted a charter to Light, Heat, and Water Company to manufacture "artificial light and heat," and to sell the same "in the City of Jackson and its suburbs." After the lapse of 51 years (1888-1939), the disputed area remained as it had always been, purely rural and somewhat wild territory located several miles west from the City of Jackson with no electric service whatever and the area

between the City of Jackson and the disputed area was of similar character; there being located therein in 1939 three "shacks", they were served with electricity by Appellee in that year, the next year, 1940, a dairy farm was served from then on, although development was not rapid at first, all who asked for service were served, by 1956 the area had been substantially developed, Appellee having therein approximately 434 services (R. VII, 822-827); in 1956, the Act was passed by the Legislature, Section 3(b)1, the grandfather clause, granting unto the utility then serving the area the right to a certificate to continue serving it—the right of service being exclusive except under certain circumstances not present here. Appellant does not deny that Appellee was serving the area fully and exclusively on that date, and, of course, Appellee with Appellant's consent received a certificate to continue serving it.

Did the Legislature thereby exceed its authority? It did, not only as Appellee's certificate in Docket U-34 covering this and many other areas around the City of Jackson is difficulty, but so are the gas certificates and the water certificates which the Commission has issued to various utilities pursuant to the Act—the old charter, including heat and water as well as "light". Not only so, but all electric, gas and water certificates which may now or hereafter be issued and outstanding in any territory which might ever in the future be annexed to the City of Jackson would be in equal difficulty.

In other words, if Appellant's position should be sustained it would mean that from and after 1888 the Legislature has been, still is and will always be precluded from granting service rights or providing for services of electric, gas or water utilities in any territory that might from and after 1888 at any time, forever, be annexed to the

City of Jackson. If it attempted to do so, no such utility could safely invest its funds to serve such territory lest at any time the corporate limits be extended and the legislative grant be rendered void, or its exclusivity characteristic emasculated.

Manifestly such is not the law. The Legislature in granting a charter in 1888 to a utility to operate in the City of Jackson and its suburbs did not surrender the State's police power to provide for and regulate utility operations in all other areas of the State and to grant rights to utilities in doing so; and the 1956 Act in all of its parts is an exercise of the State's police power.

In *Delta Electric Power Association v. Mississippi Power & Light Company*, supra (119 So. 2d at 514), the Mississippi Court said:

> "On the effective date of the Public Utility Act, and before the disputed area came within municipal limits, the legislature by that Act vested in Delta a right to receive for it a grandfather certificate. This was a valid exercise of the *police power* of the state. The municipal franchise and street lighting contract were not pre-existing rights as to the area involved in this suit because *before they could attach, if at all, the certificate issued to Delta by the Commission under the Act attached to the disputed area.* There is no constitutional objection to this interpretation. On the contrary, to deprive Delta of the disputed area as a service territory would not only be contrary to the mandatory terms of the statute but would also be violative of the certificate granted to it by the Commission. See Miss. Laws 1956, Ch. 372, Sec. 26(d) (scope of review)." (Emphasis added) cert. den. 375 U.S. 77, reh. den. 375 U.S. 961.

It may be said with equal force that on the effective date of the Act and before Light, Heat and Water Company (or its successor in interest) had acquired any serv-

ive rights whatever in the disputed area and after it had stood by and acquiesced in the area being served for 21 years by Appellee the Legislature by the said Act vested in Appellee the right to receive for it a grandfather certificate. And it could be said also with equal propriety "This was a valid exercise of the police power of the State."

It will be remembered that Appellant at no time claimed any right (or responsibility) to serve the area until it was annexed to the City of Jackson in 1960, and its claimed rights were bottomed upon the annexation. Indeed, Appellant freely admitted and agreed at all times prior thereto that Appellee had the right (and responsibility) to serve the area and to receive a certificate therefor, undertaking only to reserve any rights which might accrue to Appellant by virtue of annexation should the area be annexed to the municipality, and even this was a general reservation in a memorandum of agreement relating to all territory outside municipalities anywhere, not something specifically relating to the disputed area.

In *Delta Electric Power Association v. Mississippi Power & Light Company*, supra, before the annexation occurred the State had by the Act conferred service rights upon Delta, and in the instant case, before annexation occurred the State had by the Act conferred service rights upon Appellee (and Appellee had acquired such rights by prescription as well).

The State granted unto Light, Heat and Water Company such as it received under the 1888 charter, the State granted unto Appellee such as it received under the Act of 1956, and in the exercise of the police power in 1958 with respect to the disputed area, the State did not impinge upon what it had previously granted unto Light, Heat and

Water Company. The City of Jackson had no power to change this by annexing the disputed area in 1960.

For the Mississippi Court to have held otherwise would have required holding the Act of 1956 to be unconstitutional in respect of all territory, however distant, which may ever at any time be added to the City of Jackson—as regards not only electricity but manifestly gas and water as well; and, had it so held as to the City of Jackson, next in line would have been all territories roundabout all of the other older cities and towns throughout the State, for it is simple history judicially noticed that all charters for "light, heat and water" utilities were granted by legislative enactments in the old days (there being no general statute under which they might be chartered); and it is certain there were other charters issued in the old days to serve in the "municipality and its suburbs". Thus such a holding would have made a shambles of the Act.

It is apparent that no such effect was intended by the Legislature in the granting of corporate charters for utilities in the old days. It is equally apparent that no such strained construction carrying with it such unforeseen, unforeseeable, and unthought of consequence should have been adopted by the Mississippi Court.

All statutes will be construed in such way as to give effect to the true legislative intent and, to avoid imputing to the Legislature the bringing about of unreasonable, inequitable or unthought of results, and so important is this rule to the public interest that it need be the courts will actually "go beyond the letter of the statute" to give the rule effect, and if this be true as to statutes having general application it would be true a fortiori of statutes granting corporate charters where the selfish interests of the corporate entity could thereafter be pitted against the public interest, as is the case here. Certainly no court will im-

pute to the Legislature the intent to tie its own hands in the granting of charters in 1860 or 1888 so that it would not in later years be able to act in the public interest in providing for public utility services and the regulation thereof in vast areas surrounding and even remote from the cities in which such utilities were to operate.

In *Alexander v. Graves*, 178 Miss. 583, 173 So. 417 (1937), the Court emphasized the Legislative intent as being the "pole star" of guidance in construing statutes and said:

> "In construing statutes, the Court desires to reach a conclusion in harmony with the *intent* and *purpose* of the Legislature, and if the Legislature acts within constitutional limits, the Court will give effect to its statutes, according to the terms and intendment of the Legislature, ascertained according to recognized rules of statutory construction. Maris v. Lindsey, [illegible] Miss. 742, 87 So. 13. Where the meaning of a statute is not plain, resort must be had to the *real purpose* and intention of the Legislature in adopting it, which, when ascertained, should be given effect by the Court. Hamner v. Yazoo Delta Lumber Company, 100 Miss. 349, 56 So. 496." (Emphasis added.)

Accord: *State Highway Commission v. Cochran County*, 203 Miss. 629, 32 So. 2d 555 (Miss. 1947).

In *Zeigler v. Zeigler*, 174 Miss. 302, 164 So. 768 (1936), the same point was made and emphasis was laid upon the angle that statutes would be construed so as to avoid, if possible, unjust and unthought of results—and certainly if the Legislature in 1888 by granting one corporate charter tied its hands so it could not act in the public interest 68 years later in 1956, as to territory not touched by the earlier charter, this would be unjust and unthought of results—the Court saying:

"In construing statutes, the chief desire of the courts is to reach the *real intention* of the Legislature, and knowing this, to adopt that interpretation which will meet the real meaning, although such interpretation may be beyond, or within, wider or narrower, than the mere letter of the statute. *Unthought of results* must be avoided, if possible, *especially if injustice follows* and unwise purpose will not be imputed to the Legislature when a reasonable construction is possible (citing cases)." (Emphasis added).

Accord: *Sheffield v. Reece*, 201 Miss. 131, 28 So. 2d 745 (1947); *Gambrell v. Gulf States Creosoting Company*, 216 Miss. 505, 62 So. 2d 772 (1953).

It is submitted that there are no provisions in the old 1860 and 1888 charter enactments, whether "acted upon" or not acted upon, which would appear to make those acts form a constitutional pitfall for the Act of 1956, but even if there were the true intent and purposes of those acts would be given effect—merely the chartering of corporations for the rendering of utility services in Jackson and its suburbs—and they would pose no constitutional problem in respect of the legislative enactment of 1956 as it affects the disputed area.

3. As to "(c)" above, enough is said above to abundantly establish that even if Appellant had acquired service rights to the disputed area in 1888 (which of course is denied) it doesn't even claim that any such right arose in its favor until the area was annexed to the municipality in 1960; it certainly abandoned any such rights by (a) going for 72 years (1888-1960) without serving the area, (b) during 21 of those years (1939-1960) standing silently by and acquiescing in Appellee's service of the area, including the making of large investments in facilities therein and serving more than 200 consumers therein, (c) agreeing in 1950 before grandfather certificates were

issued in Dockets U-44 and U-84 that the area belonged to and should be certificated to Appellee, and (d) in Docket U-84, Appellee's grandfather application, withdrawing all objections and consenting to the area being certificated to Appellee.

Here the abandonment is so clear and complete as to admit of no doubt whatever, it being shown both "negatively" by failure to act and acquiescence, and "affirmatively" by agreeing that the area should be certificated to Appellee. The abandonment actually took place without Appellant's ever having taken possession of the right of one existed, which is denied; so the right was never actually "vested." In any event, if there had been such a right it was so completely abandoned that we merely cite our authorities and forego quoting from them. 1 Am Jur 2d, *Abandoned, Lost, and Unclaimed Property*, Sections 14 and 16; 1 C.J.S., *Abandonment*, Section 2a; *Krohn v. L. N. Dantzler Lumber Company*, 208 Miss. 691, 45 So 2d 276 (1950); *Columbus & Greenville Railway Company v. Dunn*, 184 Miss. 706, 185 So. 583 (1939) (and authorities cited therein).

Actually, Appellant admits and could not deny abandonment in that it claimed no right whatever to serve the disputed area but freely agreed that Appellee was entitled to serve it until March 17, 1960, the date the area was annexed to the municipality and then claimed service rights only under its municipal franchise and street lighting and water pumping agreements. It was not until that claim failed under the decisions in the cases of *Delta Electric Power Association v. Mississippi Power & Light Company* and *Capital Electric Power Association v. Mississippi Power & Light Company*, both supra, in 1963 that it even occurred to Appellant that it might claim rights under the old charters.

4. As to "(d)" above, if in 1950 when the Act was adopted, or in 1951 when the two utilities agreed that the disputed area should be certificated to Appellee in Docket U-84, Appellant had any claim of right to serve said area it was not because of its right to sell light in the City of Jackson, for the area was not within the City and never had been, thus any such claim would of necessity have had to stem from its license to sell light in the suburbs of Jackson. By agreeing that the area belonged to Appellee, and so representing to the Commission, and by withdrawing its protest altogether in Docket U-84 and taking no appeal from the final order thereon (by which the area was certificated to Appellee) Appellant has unquestionably and irrevocably agreed that it had no such service rights stemming from the "suburbs".

It should be noted here for emphasis that on August 12, 1950, the two utilities executed an agreement (R. 81 [sic] et seq.) stating inter alia:

> "Attached hereto in a part hereof are maps of Copiah, Hinds, Madison, Rankin and Warren Counties. Shown thereon are boundary lines defining the respective areas of the parties as agreed upon. Each of the maps have been initialed by the parties to the signatures hereto. Proper orders to be approved by the parties shall be entered on the minutes of the Public Service Commission." (Emphasis added.)

On August 16, 1950, there was a supplemental agreement (R. 81 [sic] et seq.) reciting:

> "The parties hereto are in the process of settling certain differences which have heretofore existed between them as to facilities, service areas and customers under the direction and supervision of the Mississippi Public Service Commission. That while the working out of these matters is in process it is deemed advisable between the parties hereto that certain facilities and customers be exchanged." (Emphasis added.)

On March 20, 1959, the two utilities filed a joint petition in Docket U-399 for exchange of facilities, etc., and in a final order entered therein June 4, 1959, the Commission found that both utilities had filed grandfather applications, Dockets U-44 and U-84, that other proceedings were pending involving controversies between the two utilities, and:

> "... that in connection with and as a part of said agreement between the company and the association for the exchange of properties and customers, that said parties should be, and are, hereby authorized to dispose of *all pending controversies* between them on the docket of this Commission *as a part of the agreement* in this case by separate order in each instance therefor. ..." (Emphasis added) (R. XI, 1580).

In due course, Appellee withdrew its protest in Appellant's grandfather application proceeding, Docket U-44 (R. X, 1519), and Appellant withdrew its protest and objection in Appellee's grandfather application proceeding, Docket U-84 (R. VII, 850). In the final order in Docket U-84 the Commission expressly found:

> "That the objection to the grant of this certificate which was filed by Mississippi Power & Light Company on September 28, 1956, has now been *fully* resolved to the *mutual satisfaction* of both the applicant and the objector so that said Mississippi Power & Light Company now *interposes no objection* to the grant of this certificate." (Emphasis added)

And, of course, the disputed area was included by metes and bounds description in that certificate to petitioner.

It is therefore submitted that from no possible viewpoint could the old charters afford respondent any defense, the Commission acted correctly in excluding them from consideration altogether, and the Mississippi Court correctly affirmed.

2. Holdings of Mississippi Court:

The Mississippi Court in its opinion not yet officially reported but unofficially reported as *Mississippi Power & Light Company v. Capital Electric Power Association*, 222 So. 2d 399 (Miss., April 21, 1969) (App. A 1, *et seq.*) sustained each of the propositions set forth under "(a)" through "(d)" above. As to "(a)", see page 404; as to "(b)", pages 404, 405; as to "(c)", page 404; as to "(d)", page 404.

It then concluded:

> "We are unable to accord a broader scope to the right claimed under the early corporate charters to serve the City of Jackson and its suburbs than is accorded to a similar grant to a utility under the 1956 Act. In neither case will the expansion of the area, whether it comprises a municipality and its suburbs or only the municipality itself, warrant an invasion of an area previously certificated to and being served adequately by another utility."

This conclusion was reached by the application of elementary and universally accepted rules of construction of legislative enactments, such rules being alluded to by the Court with ample citations of authority.

That Court thus concluded that neither the old charters themselves, nor the doing of business by the corporations under them, nor both, created any contractual obligation or covenant on the part of the state that Appellant should have the privilege or right to provide electric service in the disputed area either at the time the charters were granted or later. And this, of course, is another way of saying that the state did not breach any contractual obligation to Appellant when it adopted the 1956 Act under the terms of which Appellee was, on the basis of prior service, granted the right to a certificate to the area, not

3. This Court Will Accept the Mississippi Court's Interpretation of Mississippi Legislative Enactments, Including Legislative Charters

pellant charter authority to sell "light, heat and water" in the City of Jackson and its suburbs as the City then existed (including of course the easement for use of the streets and roads); that such suburbs did not include the disputed area (this being a determination of fact based on undisputed evidence); and without deciding or attempting to decide every possible case which could or might have arisen in the interim between the granting of the charters in 1888 and the adoption of the Act in 1956 expressly held that the legislature did not intend to grant and did not grant authority for Appellant acting under such charters to invade the certificated service area of another utility unto which certificated service rights were granted under the 1956 Act covering area not within the City of Jackson or its suburbs when the charters were granted nor when (in 1939) the area was first served by the present certificate holder, Appellee.

This Court will accept that interpretation.

In *3 Cyclopedia of Federal Procedure*, 3rd Ed., Section 6.14, pages 183-186, it is said:

> "State decisions establishing state law constitute the rule of decision where they are applicable to matters in civil actions in the federal courts and where the Federal Constitution, federal statutes, treaties or state statutes are not applicable thereto, Swift v. Tyson in this respect being overruled by the Erie case. Of course, the highest state authority is the final authority on state law.
>
> "State decisions construing state statutes and municipal ordinances are to be followed as the rule of decision in federal courts. The same rule applies to the

2. It further held, of course, that even if this were not the case Appellant would have long since lost any rights it might have had in respect of the disputed area by abandonment (this conclusion also being based on detailed and undisputed evidence).

construction of state constitutions, and it also applies to the interpretation of state administrative orders under authority of state statutes."

In *Albertson* v. *Millard*, 345 U.S. 242 (1953), there was an appeal by plaintiffs from a judgment of the United States District Court for the Eastern District of Michigan holding that the Michigan Communist Control Bill was constitutional. This court held:

"The construction given to a state statute by the state courts is binding upon the federal courts. There has been no interpretation of this statute by the state courts. The absence of such construction stems from the fact this action in federal court was commenced only five days after the statute became law.

"There is pending in the Circuit Court for Wayne County, Michigan, a bill seeking a declaratory judgment that the Act is unconstitutional, both on federal and state grounds. That action is being held in abeyance pending our mandate and decision in this case.

"We deem it appropriate in this case that the state courts construe this statute before the District Court further considers the action (citing cases).

"The judgment is vacated and the cause remanded to the District Court. . . ."

In *Southern Bell Telephone and Telegraph Company* v. *City of Meridian*, 358 U.S. 639 (1959), this Court dealt with a similar situation, vacated the judgment of the Fifth Circuit, and ordered the District Court (D.C., S.D. Miss.) to hold the case pending interpretation by the state court of a state statute and a state constitutional provision.

In *United States* v. *Burnison*, 339 U.S. 87 (1950), two appeals were combined for decision and they involved the power of the California Supreme Court to declare invalid

testamentary dispositions to the United States by two California residents. This court said:

> "The California Court construed Section 27 of the California Probate Code to prevent a California domiciliary from making an unrestricted testamentary gift to the United States, although such a gift may be made to California, its counties and municipal corporations. The court arrived at this interpretation despite the contention of the United States that it would raise serious constitutional questions. The construction of the California Code by the California Supreme Court is, of course, binding on us. It leaves us, however, with the federal constitutional questions that the United States urged the California Court to avoid."

4. Scope of Police Power

Even if the old charters had possessed the contractual characteristics claimed by Appellant, the Act of 1956 would have been a valid exercise of the police power of the state. To the extent that the 1888 charter "contracts" were thereby impaired the impairment would have been permissible and not proscribed by the contract clause of the Federal Constitution.

Since adoption of the Mississippi Constitution of 1890, the state has expressly reserved the authority to alter, amend or repeal corporate charters (Miss. Const. Art. 7, Sec. 178); but quite apart from this and before that time the state has always had authority to modify or abridge contracts wherever such was needful in a bona fide exercise of police power in the interest of the common welfare. Such authority inheres in sovereignty and is inalienable.

Even if the 1888 charters had amounted to a contractual covenant to the effect that Appellant was given the right to serve the disputed area if and when it should be annexed to the City of Jackson; and 62 years later it be-

came needful that the state act as it did in the 1956 Act to provide for the general welfare; it certainly had power to do so.

Both the preamble and the text of the 1956 Act reveal legislative determination that it was urgent that a statewide system of regulation of certain public utilities be established, including, among other things, rates, services, and *service area allocations* in order to protect and promote the public interest and welfare. The preamble reads as follows:

> "WHEREAS, the services of certain public utilities have been extended to large areas of the state, both within and outside of municipalities, and it is in the public interest that the Public Service Commission of the State of Mississippi be vested with authority to regulate such utilities' rates and services, so as to assure reasonably adequate services to the inhabitants of this state at rates which will be fair and reasonable to the consumer, and provide a fair return to said utilities, both of which objectives are necessary to the general welfare of this state; Now, Therefore, . . ."

The text of the Act included provisions for allocation and certification of service areas to all utilities—Appellant, Appellee and all others. Such allocations were to be made primarily under the "grandfather clause" on the basis of prior service so that each utility would be assured of all of the territory it was then serving as a matter of right and would not be required to sacrifice its investment in facilities for the service of such territory; and each could be certificated additional territory upon petition and proof that the public convenience and necessity required or would require such additional certification to it.

The service areas so certificated to the respective utilities were to be exclusive except where under certain cir-

cumstances the Commission should order partial cancellation of certificates (basically this could be done only in an instance where a utility failed or refused to provide adequate service to a portion of its certificated area). This exclusivity was deemed to be and obviously was in the public interest for many reasons, including economy, avoiding the duplication of service facilities, avoiding unwholesome or "cut throat" competition, avoiding what is known in the industry as "pirating" customers and the like (Section 5 of the Act; A. A4).

In such circumstances the state in the exercise of its police power would have been permitted to adopt the Act for alleviation of the problems involved, even if contractual rights had been thereby impaired. It would not matter whether the contractual obligations were those of the state or someone else. This principle is universally recognized and sustained by the authorities. In 16 CJS, *Constitutional Law*, Section 281, the principle is expounded as follows:

> "In accordance with the rule that the state may not divest itself by contract or otherwise of its police power, one state legislature cannot by any agreement bind itself or its successors not to exercise the police power of the state. The reservation of essential attributes of sovereign power is read into contracts as a postulate of the legal order. All contracts are made with reference to the possible exercise of the police power of the government and with the possibility of such legislation as an implied term of the law thereof; and *whether made by the state itself*, by municipal corporations, or by individuals or private corporations, they cannot extend to defeat legitimate government authority, but are subject to be interfered with, or otherwise affected by, subsequent statutes enacted in a bona fide and appropriate exercise of the police power, and do not, by reason of the contracts clause of the constitution, enjoy any immunity from such

legislation, regardless of whether the legislative action affects contracts incidentally, or directly or indirectly.

"This rule is not only reasonable, but necessary, since a rule to the contrary would enable individuals, by their contracts, to deprive the state of its sovereign power to enact laws for the public welfare. . . .

"The foregoing rules have been *applied to regulations of public service agencies*, of business, of the professions, of the use of public highways, . . ." (Emphasis added).

The same principle was effectively expounded by the Mississippi Court in the case of *Delta Electric Power Association* v. *Mississippi Power & Light Company*, supra (149 So. 2d at 508) as follows:

"United Gas Corp. v. City of Philadelphia, 238 Miss. 409, 118 So. 2d 618 (1960), is significant. Miss. Code 1942, Sec. 3433, authorized a city to fix utility rates subject to review by the chancery court. Thereafter the Public Utility Act repealed Section 3433, and vested in the Commission the right to determine such rates. In 1946, the city granted United a franchise for 25 years. United proposed to increase its gas rates, and the city obtained an injunction prohibiting it from doing so. Reversing that decree, this Court held that jurisdiction to fix rates was vested by the 1956 Act in the Commission. The city's remedy was said to be before the Commission, and no longer the chancery court. The legislature 'reserved the right to pass such laws as may be expedient or necessary in municipal affairs.' *The 1956 Act superseded pro tanto the precedent franchise to United.* The legislature acting under its police power, had the right to vest in the Commission power to determine rates." (Emphasis added).

In the very case now before this Court the Mississippi Court again emphasized the basic need for the exercise

of the police power of the state in the enactment of the 1956 Act in the public interest (222 So. 2d at 405) as follows:

> "The case of Capital Electric Power Ass'n v. Mississippi Power & Light Company, 240 Miss. 139, 150-151, 125 So. 2d 739, 743 (1961) was the first decision of this Court under the Act of 1956 and in it the Court said:
>
> > It is clear from Chapter 372, Laws of 1956, that it was the intention of the legislature that facilities of one utility should *not be duplicated in* the same area. * * * The *manifest policy* of the act is to *prevent duplicating and overriding facilities and certificates.* * * * An existing utility within the certificated area has the *right* and *duty* to provide the service and *must* be given that opportunity. If it fails, the commission can award another franchise to another utility. Section 5(c) and (f) makes this clear." (Emphasis by the Court).

Thus, under any view of the old charters, whether that of the Mississippi Court, or that contended for by Appellant, the 1956 Act is valid.

5. Appellant's Authorities and Arguments

Appellant's effort is to bring the old charters of 1860 and 1888 within the familiar doctrine of an "offer and acceptance" type of contract which the non-impairment of contracts clause of the Federal Constitution will protect. It is submitted that what has been said above shows that this cannot be done.

Appellee of course finds no fault with the doctrine; it only says Appellant does not come within it.

This doctrine has been dealt with in many cases, both state and federal, and no good purpose would be served by discussing all or even many of them. Appellee has chosen

to deal with only two which it regards to be leading cases, one a state decision, the other federal, to-wit: *Southern Bell Telephone and Telegraph Company* v. *City of Meridian*, 241 Miss. 678, 131 So. 2d 666 (1961) which will be referred to as "Bell"; and *Russell* v. *Sebastian*, 233 U.S. 195 (1914) which will be referred to as "Russell".

Bell arose under Chapter 38, Laws of 1886. The facts were stipulated and no evidence was introduced. Before 1850 the telegraph had come into public use; and in 1876 the telephone was invented. There was a great surge by the legislature to bring those services into the state. To that end Chapter 38, Laws of 1886, was enacted with this preamble: "AN ACT to Encourage and Facilitate the Construction of Telegraph, Telephone and like lines in the State of Mississippi." The Act extended to any telegraph or telephone company incorporated "by the laws of this or any other state" an invitation to build lines along all public roads, streets and waters of the state free of charge. Bell's predecessor accepted the offer and built lines in Meridian and elsewhere and the building continued and is still going on.

It was held that Section 5(e), Chapter 372, Laws of 1956, which required telephone companies to pay 2% of revenue to municipalities as "rent" for use of the streets was in violation of the contract clause of the state constitution because Bell (and its predecessors) had accepted the "offer" of the state and had built lines along and through the streets of the City of Meridian and the offer and acceptance constituted a contract for the free use of those streets.

In *Bell* there was discussion of the matter of acceptance of the state's offer not being required to be on a "foot by foot" basis as facilities were built, but there was no service area question in the case. The "foot

by foot" doctrine had been developed in *Russell* referred to by the Mississippi Court as perhaps the leading case in this general field of law; and *Russell* did not involve any service area problem either.

Russell is undoubtedly a leading case. The California constitution carried a section adopted in 1885 offering free use of city streets in cities having no municipal light or water works to companies who would build and operate systems in such cities. In 1909 a gas company commenced building and operating a gas manufacturing plant and distribution system in the City of Los Angeles. In 1911 the constitution was amended to in effect withdraw the former offer and give municipalities control over utility companies located and operating within their confines.

Meantime, however, the company in Los Angeles had built a plant big enough to serve the entire city, costing approximately $100,000.00 (big money in those days) over and above what a plant would have cost to serve only the area that had been reached with the laying of pipes (although the company had made good progress in laying pipes). To operate the plant to serve only the area then reached by pipes would have caused a loss to the company of at least $2,000.00 per month. Nevertheless, the City sought by adoption of ordinances to prevent the company from installing pipes in the remaining streets of the City (except it pay the City a consideration).

The Court held that the company had in good faith accepted the offer for the whole city and had been diligent in building its system to reach the entire city; that it was not required to accept the offer "foot by foot, as pipes were laid" but had actually accepted it as a whole and that this was in accordance with the "purpose and express language" of the constitutional provision.

Accordingly, the court held that there had been an offer and acceptance and the company would be permitted to lay its pipes in the remaining streets of the City free of charge.

Appellant has no quarrel with the rule enunciated in *Bell* and *Russell*. But Appellant may not come under that rule because:

(a) The state made no "offer" to the incorporators receiving the charters here involved in 1860 and 1888. To the contrary the incorporators applied for charters and they were issued. It so happened that there was no general corporation statute under which gas, electric or water companies could be organized at those times and there was none granting to such companies the use of streets, roads, etc., for construction of their facilities; therefore, it took acts of the legislature to grant the charters and the easements. That procedure was quite common for these and other types of corporations in those days.

But the fact that the charters and easements were granted by legislative enactments rather than under general statutes did not give the corporations any different or better position than would have been the case had these grants been made under general statutes. And the granting of a charter under a general corporation statute; and the existence of a general statute granting to public utilities the use of rights-of-way, etc.; certainly does not constitute an "offer" which when accepted matures into a contract with attributes such as attended the contract involved in *Bell* or *Russell*.

(b) Neither *Bell* nor *Russell* sheds light on the questions presented by this appeal because neither involved the invasion by one public utility of the certificated service area of another public utility of like kind. As to *Bell*

it is common knowledge which may be judicially noticed by the courts of Mississippi (and it is believed by this court as well) that in this state there are quite a number of other telephone utilities (commonly referred to as "independents") which entered the field after repeal of Chapter 38, Laws of 1886 (it was repealed in 1892), hence never had an opportunity to accept the "offer" which Bell accepted; yet they like Bell have certificated service areas under the 1956 Act. If the Bell company undertook to invade the certificated area of one of the other telephone companies it would not be aided in that effort by the fact that its acceptance of the offer of Chapter 38, Laws of 1886, gave it the free use of the streets, roads and public places throughout the state whether within or without municipalities (a benefit not enjoyed by the others). It would be governed by the regulatory provisions and restrictions of the Public Utility Act of 1956 just as are the others.

(c) Adverting in some measure to the exercise of the police power: Appellant and Appellee each and both enjoyed charter authority under charters granted under general statutes (Appellant under its Florida charter and Appellee under its Mississippi charter) to operate *throughout* the State of Mississippi, both within and without municipalities, prior to adoption of the Act of 1956; but under that Act they were each and both restricted (as to grandfather rights) to areas already being served by them, respectively, on the effective date of that Act; and could secure certification of additional area only upon proof that the public convenience and necessity required it. Thus, the scope of their operating privileges under their corporate charters was stringently reduced and restricted by the regulatory Act of 1956. Their charters constituted "contracts" between them and the state in certain ways.

But these restrictions and limitations do not mean that there has been impairment of contracts in violation of the non-impairment clause of the Federal Constitution. It only means the state has legitimately exercised the police power for the regulation of public utilities for the purpose *inter alia* of bringing to an end "unnecessary and uneconomic duplication of such facilities as between two persons (utilities)" (Act, Section 5(c); A. A5). Such an exercise of the police power of the state is not proscribed by the non-impairment clause of the Federal Constitution. See authorities cited on pages 34-35 hereof.

The very same is true in respect of such operating privileges as Appellant may have under the old charters issued by legislative enactments.

Of the decisions other than *Bell* and *Russell* cited by Appellant on the doctrine enunciated in those cases these are to the same general effect: *Owensboro* v. *Cumberland Tel. & Tel. Co.*, 230 U.S. 58 (1913); *Fletcher* v. *Peck*, 6 Cranch. 87, 137 (1810); *Walla Walla* v. *Walla Walla Water Company*, 172 U.S. 1 (1898); *Minneapolis* v. *Minneapolis Street R. Co.*, 215 U.S. 417; *People ex rel. Woodhaven Gaslight Co.* v. *Deehan*, 153 N.Y. 528, 533 (1897); *City of Louisville* v. *Cumberland Telephone & Telegraph Co.*, 224 U.S. 649 (1912).

But these additional decisions do not enlarge upon the doctrine in any way; nor is there anything in any of them to suggest any modification of the discussion of the doctrine set forth above; therefore, to analyze and discuss them in detail would neither add to nor detract from the discussions set forth above.

Frost v. *Corporation Commission of Oklahoma*, 278 U.S. 515 (1929) merely holds that a certificate of public convenience and necessity issued by a state utility com-

mission to a public utility (in this instance a cotton gin was a public utility by statute) is in truth and in fact a franchise from the state; is a valuable property right which will be protected by the Courts; and a certificate holder is entitled to a cease and desist order against a non-certificated competitor seeking to serve in the same area. This holding, of course, sustains Appellee's position in the instant case. To the same effect are these decisions of the Mississippi Court: *Capital Electric Power Association* v. *Mississippi Power & Light Company*, 240 Miss. 139, 125 So. 2d 739 (1961); *Mississippi Power Company, et al.* v. *East Mississippi Electric Power Association, et al.*, 244 Miss. 40, 140 So. 2d 286 (1962); *Delta Electric Power Association* v. *Mississippi Power & Light Company*, 250 Miss. 482, 149 So. 2d 504 (1963); *Capital Electric Power Association* v. *Mississippi Power & Light Company*, 250 Miss. 514, 150 So. 2d 534 (1963); and the very case now on appeal, *Mississippi Power & Light Company* v. *Capital Electric Power Association*, 222 So. 2d 399 (1969).

VI. SUMMARY OF ARGUMENT

1. There Has Been No Impairment of the Obligations of a Contract

The charter of Jackson Gaslight Company was granted by legislative enactment in 1860 and amended by legislative enactment in 1888. As so amended it authorized the company to render electric service in the City of Jackson and gave an easement for use of the streets and alleys for building power lines.

The charter of Light, Heat and Water Company was granted by legislative enactment in 1888 and authorized the company to render electric service in the City of Jackson and its suburbs; and it also included an easement for

use of the streets and alleys of the city as well as public roads adjacent thereto.

Appellant, a corporation organized under the laws of Florida, and authorized to do business and doing business in the State of Mississippi, claimed rights under the old charters granted by legislative enactments as aforesaid as successor in interest to the companies receiving those charters. Appellant defended the petition by Appellee for cease and desist order before the Commission on the ground *inter alia* that these old legislative charters gave it authority to serve in the disputed area after that area was annexed to the City of Jackson.

The Commission rejected this claimed right and the Mississippi Court affirmed.

The Mississippi Court was correct in doing so because:

(a) The old charters aforesaid did not grant any rights whatever with respect to the disputed area which lay not within the City of Jackson or its suburbs but several miles away in purely rural area constituted of swamps, woodland, pastures and cultivated fields (and areas in between were of similar character). The evidence showing the location of the disputed area, its nature and character and the nature and character of the area between the City of Jackson and the disputed area was full and in detail, and was not disputed.

That the disputed area was not a "suburb" of the City of Jackson is clearly shown by the authorities cited in the Argument section of this brief and the citations will not be repeated here.

(b) The Legislature in granting the said utilities operating rights in the City of Jackson in 1888 and by grant-

ing unto the City (by means of general statutes) authority from time to time to extend its corporate boundaries did not thereby divest itself of power and authority to grant rights to petitioner with respect to the disputed area at a time (1956) when it lay outside the municipality; and the exercise by the City of the authority to extend its corporate limits in 1960 did not have the effect of canceling the rights granted by the Legislature to petitioner in 1956.

By 1939 some 51 years after the charter of Light, Heat and Water Company authorized it to serve "in the City of Jackson and its suburbs" the disputed area was still of the same type and character as it had always been, that is, rural area, sparsely settled, swampy in large part and the remainder woods and fields. In 1939 there were three "shacks" located in the area and they were served with electricity by Appellee; in 1940 a farmhouse in the area was served by Appellee. Highway 80 traversed the area in 1940 after which it began to build up with small residences and small commercial enterprises. By the time the Public Utility Act was adopted in 1956 Appellee was serving approximately 134 consumers in the area. Meantime, Appellee had held itself out as being ready, able and willing to provide service to all who desired it in the area; and it served all who applied.

Neither Appellant nor any other electric utility has ever at any time served the area or any part of it (except Appellee had connected 6 scattered services around the edges sometime prior to 1956). These services will be referred to more specifically later herein.

The 1956 Act by Section 5(b) thereof the so-called "grandfather clause" gave Appellee a right to a certificate of public convenience and necessity to continue serving the area as it had done before.

The legislature did not thereby exceed its authority. Statutes will be construed in accordance with the "real intention" of the legislature in enacting them; and will be construed so as to avoid bringing about unforeseen, unthought of or inequitable results. Manifestly, it was not the intention of the legislature in granting a charter in 1888 to serve the City of Jackson and its suburbs to tie its own hands so that thereafter for all time to come it would be without authority through the exercise of the police power to provide for and regulate public utility services in any areas roundabout the City of Jackson, whether near or far, which might ever at any time be annexed to the City of Jackson.

Before the disputed area was annexed to the City of Jackson in 1960 (the event which Appellant claims matured its right to serve therein) the legislature had already in 1956 under the terms of the Act granted unto Appellee the right to a certificate to serve the area and this right had been implemented by the issuance of the certificate by the Commission. This grant to Appellee was valid. To hold otherwise would be to accord to the old charter granted by legislative enactment unforeseen, unthought of and inequitable effects; indeed effects destructive of the public interest.

Actually, there was no general corporation statute or other statute under which the charter could have been granted at that time, hence it was necessarily granted by legislative enactment (as were virtually all other corporate charters in those days).

An added reason why that charter may not be accorded such attributes is that it applied not only to electricity but to gas and water. Under the 1956 Act gas companies and water companies also received certificated service areas roundabout the City of Jackson. Thus, un-

der Appellant's contention the state would have tied its hands so that at no time after 1888—and into the future forever—could it provide for and regulate electric, gas or water utilities in the vicinity of Jackson and provide for exclusive service rights in certificated areas (as is done in the 1956 Act for good reasons) lest at any time the corporate limits of the City be expanded and the exclusivity of public utility certificates emasculated.

(c) Even if Appellant had acquired service rights in the disputed area in 1888 (which is certainly denied and respondent *doesn't even claim* any such rights except following extension of the corporate limits in 1960) those rights would have long since been abandoned and lost because Appellant not only did not serve the area but stood by and acquiesced in Appellee's serving it from 1939 to 1960, a period of 21 years, without protest or objection; and in so serving it, Appellee necessarily invested large sums in distribution facilities therein and acquired more than 200 valuable service contracts therein under circumstances and conditions justifying its belief that it would serve the area indefinitely.

Appellant, if it acquired any rights by annexation of the disputed area to the municipality in 1960, has abandoned and lost such rights by: (a) going for 72 years (1888-1960) without serving the area; (b) during 21 of those years (1939-1960) standing silently by and acquiescing in Appellee's service of the area necessarily involving substantial investments in facilities and serving more than 200 consumers therein under circumstances warranting it to believe and believing that it would serve the area indefinitely; (c) agreeing in 1959 before grandfather certificates were issued to Appellee and Appellant by the Commission that the area should be certificated to Appellee; and (d) withdrawing all objections in Docket U-84, Appellee's

grandfather application, before the Commission and consenting that the area be certificated to Appellee.

(d) In 1959 Appellant and Appellee reached an agreement as to areas that would be certificated to them, respectively. The effort to so agree had been undertaken at the request of the Commission made some three years earlier. Agreement having been reached Appellant and Appellee jointly petitioned the Commission in Docket U-399 to approve of the agreement; and the Commission did approve it. Thus Appellant unequivocably agreed that the area should be certificated to Appellee; and will not now be heard to deny this. If Appellant had thought then that it had any rights stemming from the old charters to serve the disputed area because it was a "suburb" of the City of Jackson, it would have said so. It is evident that Appellant did not then think that it had ever had such a right; or, it knew it had abandoned any right it might have had.

2. Holdings of Mississippi Court

The Mississippi Court sustained each of the propositions set forth under "(a)" through "(d)" above.

3. This Court Will Accept the Mississippi Court's Interpretation of Mississippi Legislative Enactments, Including Legislative Charters

This Court will accept the interpretation of a state court of last resort of legislative enactments of the state. This rule includes the state Constitution, general statutes, special legislative enactments, municipal ordinances and administrative orders under authority of state statutes.

Manifestly, therefore, it includes a legislative grant of a charter of incorporation.

Therefore, this Court will accept the Mississippi Court's interpretation that the old legislative charters granted no rights whatever to serve the disputed area; that had they granted any such rights those rights have under the facts of this case long since been abandoned by Appellant; and that the rights granted to Appellee to serve the disputed area pursuant to the 1956 Act are valid rights as against all claims of Appellant.

4. Scope of Police Power

Even if the old charters had possessed the contractual characteristics claimed by Appellant the Act of 1956 would have been a valid exercise of the police power of the state nevertheless. To the extent that the old 1888 charters were thereby impaired the impairment would have been permissible and not proscribed by the contract clause of the Federal Constitution.

The state has always possessed police power to act in the interest of the common welfare even where this may involve the impairment of contracts; even the state's own contracts; and such action is not within the protection of the contract clause of the Federal Constitution.

This authority inheres in sovereignty and is inalienable.

Both the preamble and the provisions of the 1956 Act reveal an urgent need for the exercise of the police power in the regulation of public utilities in the state, including the electrical industry. A basic purpose was to eliminate an intolerable condition then existing involving duplication of facilities, unwholesome or "cut throat" competition, "pirating" of customers and the like.

Thus, it was determined to issue to each electric utility a grandfather certificate on an *area basis* authorizing it to

continue serving the area it was serving on the effective date of the Act; and giving it *exclusive* service rights in that area (except where it failed or refused to provide adequate service). After this the utility could secure additional service area only upon petition to the Commission and proof showing public convenience and necessity.

Necessarily, electric lines having been crisscrossed and duplicated in the past in every instance there would be a few "stray" services of another utility in the area to be certificated to any particular utility; and this accounts for the 6 scattered services of Appellant in the disputed area in which at the time the Act was adopted in 1956 Appellee had some 134 services. The Commission adopted the plan with respect to electrical utilities and all other utilities of "freezing" these stray services so that the neighboring utility could continue serving them although it could not render new services in the area which was being predominantly served by the other utility (to which the certificate was issued) on the effective date of the Act. This was a necessary expediency and it worked well.

The authorities are in agreement that under the conditions manifestly existing at the time of the adoption of the Act; in fact, under conditions which any court will judicially notice would prevail in the absence of any regulation; the state had the police power to regulate even if contract rights were impaired thereby.

Appellee says Appellant had no such rights; but had it had such rights the Act would be valid nevertheless.

5. Appellant's Authorities and Arguments

Appellant's effort is to bring the old charters of 1860 and 1888 within the familiar doctrine of an "offer and acceptance" type of contract which the non-impairment of contracts clause of the Federal Constitution will protect.

Appellee finds no fault with that doctrine; but it says Appellant does not come within it.

In the Argument section of this brief Appellee has chosen two leading cases, one a state case, the other federal, as a basis for discussing the rule and showing that Appellant does not come under it. These cases are *Southern Bell Telephone and Telegraph Company* v. *City of Meridian*, 241 Miss. 678, 131 So. 2d 666 (1961), referred to as "Bell"; and *Russell* v. *Sebastian*, 233 U.S. 195 (1914), referred to as "Russell".

Bell arose under Chapter 38, Laws of 1886. That Act actually *urged* telegraph and telephone companies to come into the state or accept charters from the state and operate therein. As an inducement it offered free of charge rights-of-way along all the roads, streets and waters of the state. The Bell company accepted and built lines among other places in the City of Meridian. It fully served that city. In 1956, Section 5(e), Chapter 372, Laws of 1956, required telephone companies to pay 2% "rent" to municipalities for use of their streets.

It was held that the Bell company having accepted the state's offer and acted upon it a contract matured which would be protected under the contract clause of the state Constitution.

In *Russell* the Constitution of California adopted in 1885 carried a section offering the free use of streets in cities having no municipal light or water works to companies who would build and operate such systems in such cities.

A gas company accepted and made rapid progress in building its lines throughout the city but had not reached all parts of the city when in 1911 the constitutional pro-

vision was changed so as to withdraw the offer and vest in municipalities authority over such utilities. Thereupon, the City demanded that the gas company discontinue building its pipes in the remaining streets of the city (except it pay the city a consideration).

It was held that the constitutional offer of 1885 had been fully accepted as to the city as a whole in accordance with the "purpose and express language" of the constitutional provision; and the gas company having already built a plant much bigger than would be required to serve just the area where pipes had been laid and having been diligent in laying pipes and having made good progress in doing so, it would be permitted to lay its pipes in the remainder of the streets of the city. The offer was as to the city as a whole and was so accepted, hence there was a contract which was protected by the constitutional provision.

Appellant has no quarrel with the rule enunciated in *Bell* and *Russell*. But Appellant may not come under the rule because the state made no "offer" to the incorporators receiving the charters in 1860 and 1888; only granted an application for a corporate charter to do business. There being no general statute under which the charters could be granted they necessarily were granted by legislative enactments, this being the method in use with respect to electric, gas and water companies as well as many other types of corporations in those days.

Appellee finds that a number of other cases cited by Appellant on this doctrine are to the same general effect as *Bell* and *Russell*; but nothing in those decisions warrants individualized analyses thereof.

One of Appellant's cases, *Frost* v. *Corporation Commission of Oklahoma*, 278 U.S. 515 (1929), clearly supports

Appellee's position in the instant case. It holds that a certificate of public convenience and necessity issued by a state utility commission to a public utility is in truth and in fact a franchise from the state; is a valuable property right which will be protected by the courts; and a certificate holder is entitled a cease and desist order against a non-certificated competitor seeking to serve in the same area. That is precisely what the Mississippi Court has held in a number of cases.

VII. CONCLUSION

1. The old charters of 1860 and 1888 granted no rights to serve in the disputed area which was neither in the City of Jackson nor in its suburbs.

2. The grant to Appellee of the right to serve the disputed area under the Public Utility Act of 1956 was a valid grant, said area lying outside the City of Jackson and having been served fully and adequately by Appellee since 1939.

3. Even if Appellant had acquired rights to serve in the disputed area by virtue of the charters of 1860 and 1888 it lost those rights by failure to serve and abandonment.

4. Even if Appellant had acquired rights to serve in the disputed area by virtue of said charters of 1860 and 1888 whether such rights had been abandoned or not the Public Utility Act of 1956 was a valid exercise of the police power of the state in the interest of the general welfare; was not proscribed by the contract clause of the Federal Constitution; and under the terms of that Act and its certificate of public convenience and necessity Appellee has the exclusive right to serve the disputed area.

5. Appellant has wholly failed to show that it has contractual rights under the charters of 1860 and 1888

which will be protected under the contract clause of the Federal Constitution.

Appellee therefore respectfully submits that this motion to dismiss the appeal should be sustained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, T. HARVEY HEDGEPETH, Attorney of Record for Capital Electric Power Association, Appellee in the above styled cause, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served the foregoing Motion to Dismiss upon Appellant in the following manner: By depositing copies thereof in sealed envelopes in the United States Post Office in Jackson, Mississippi, with first-class postage prepaid, properly addressed to each of the Attorneys of Record for Appellant, Mississippi Power & Light Company, to-wit: Bernard G. Segal, Esquire, 1719 Packard Building, Philadelphia, Pennsylvania, 19102; Samuel D. Slade, Esquire, 1719 Packard Building, Philadelphia, Pennsylvania, 19102; Sherwood W. Wise, Esquire, 925 Electric Building, Jackson, Mississippi, 39201; Garner W. Green, Esquire, 800 Electric Building, Jackson, Mississippi, 39201; and Joshua Green, Esquire, 800 Electric Building, Jackson, Mississippi, 39201.

I further certify that I have caused to be mailed, first-class air mail, postage prepaid, 40 printed copies thereof to the Clerk, United States Supreme Court, Washington D. C., 20520.

THIS October 16, 1969.

T. Harvey Hedgepeth

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APPENDIX

A1

APPENDIX 1

Sections 1, 4, 5, 6, 22, 26 and 28 of Chapter 372, *Mississippi Laws of 1956* (Sections 7716-01, 7716-04, 7716-05, 7716-06, 7716-22, 7716-26 and 7716-28, Volume 6 Recompiled, *Mississippi Code of 1942*)

Section 1. *Definitions.* A. The term "corporation," when used in this act, includes a private or public corporation, a municipality, an association, a joint stock association or a business trust.

B. The term "person," when used in this act, includes a natural person, a partnership of two (2) or more persons having a joint or common interest, a co-operative, non-profit, limited dividend or mutual association, a corporation as hereinbefore defined, or any other legal entity.

C. The term "municipality," when used in this act, includes any incorporated city, town or village.

D. The term "public utility," when used in this act, includes persons and corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for:

(1) The generation, manufacture, transmission or distribution of electricity to or for the public for compensation.

(2) The transmission, sale, sale for resale, or distribution of natural, artificial, or mixed natural and artificial gas to the public for compensation by means of transportation, transmission, or distribution facilities and equipment located within this state, but shall not include the production and gathering of natural gas, the sale of natural gas in or within the vicinity of the field where produced, nor the distribution or sale of liquefied petroleum gas.

(3) The transmission, conveyance or reception of any message over wire, or by radio, or otherwise, of writing, signs, signals, pictures and sounds of all kinds by or for the public, where such service is offered to the public for compensation; and the furnishing, or the furnishing and maintenance, of equipment or facilities to the public, for compensation, for use as a private communications system or part thereof; provided, that no persons or corporations not otherwise a public utility within the meaning of this act shall be deemed such solely because of engaging in this state in the furnishing, for private use as last aforementioned; and provided further that nothing in this act shall be construed to apply to television stations, radio stations or community television antenna services.

(4) The transmission, distribution, sale or resale of water to the public for compensation.

(5) The term "public utility" shall not include any person not otherwise a public utility, who furnishes the services or commodity described in sections 1 D (1), 1 D (2), 1 D (3) and 1 D (4) of this act only to himself, his employees or tenants as an incident of such employee service or tenancy, and provided such services are not sold or resold to such tenants or employees on a metered or consumption basis.

E. The term "rate," when used in this act, means and includes every compensation, charge, fare, toll, rental and classification, or any of them, demanded, observed, charged or collected by any public utility for any service, product or commodity described in this section, offered by it to the public, and any rules, regulations, practices or contracts relating to any such compensation, charge, fare, toll, rental or classification; except, however, the term "rate" shall not include charges for electrical current furnished, delivered or sold by one public utility to another for resale.

F. A public utility's business other than of the character defined in subparagraphs (1) to (4) of subsection D of this section is not subject to the provisions of this act.

G. The word "commission," when used in this act, shall refer to the Public Service Commission of the State of Mississippi as now existing, unless otherwise indicated.

H. Any public utility as defined in paragraph D above, owned or operated by a municipality shall not be subject to the provisions of this act, except as to extension of utilities greater than one mile outside of corporate boundaries after the effective date of this act.

* * *

Section 4. *General jurisdiction and powers.*—Subject to the limitations imposed in this act, and in accordance with the provisions hereof the commission shall have exclusive original jurisdiction over the intrastate business and property of public utilities as herein defined, except and provided, however, that the commission shall not have jurisdiction over the production and gathering of natural gas, or the sale of natural gas in or within the vicinity of the field where produced, nor over the facilities and equipment utilized in any such operations including but not limited to such facilities as separators, scrubbers, and gasoline plants of all types. Provided, further, the commission shall not have jurisdiction to regulate the rates or the following sale of commodities or services: (1) sales of gas, water or electricity by municipalities to such persons as said municipalities are authorized by law to serve; (2) sales of gas or electricity by co-operative gas or electric power associations to the members thereof as consumers, except as provided by section 5, paragraphs (d) and (e) where service is rendered in a municipality.

Section 5. *Certificate of public convenience and necessity: when required.*—No person shall construct, acquire, extend or operate equipment for manufacture, mixing, generating, transmitting or distributing natural or manufactured gas, or mixed gas, or electricity, or water, for any intrastate sale, to or for the public for compensation, or for the operation of a public utility operating a business and equipment or facilities as contemplated by subsection D (3) of section 1, of this act, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facility.

(a) Provided, however, nothing herein shall be construed to require any certificate of convenience and necessity from the commission for the production and gathering of natural gas, the sale of natural gas in or within the vicinity of the field where produced, the distribution or sale of liquefied petroleum gas, or for the facilities and equipment utilized in any such operations.

(b) The commission shall issue a certificate of convenience and necessity to any person engaged in the construction or operation of such equipment or facility on the effective date of this act, for the construction or operation then being conducted, without requiring proof that public convenience and necessity will be served by such construction or operation, and without further proceedings, if application for such certificate is made to the commission within six (6) months after the effective date of this act; and pending the filing of any such application and the issuance of a certificate, the continuance of such construction or operation shall be lawful. Any utility covered by this act which has heretofore been under the jurisdiction of the Mississippi Public Service Commission shall, upon application within six (6) months of the effective date of

this act, be issued a certificate authorizing it to conduct operations and make extensions within any area covered by its service area map or maps on file with the Mississippi Public Service Commission on the effective date of this act.

(c) In all other cases the commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the commission; provided, however, no certificate shall be required for extensions or additions within the corporate limits of a municipality being served by the holder of a certificate of convenience and necessity, and provided further, that the commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section: (1) temporary acts or operations for which the issuance of a certificate will not be required in the public interest; and (2) extensions or additions of service facilities outside of municipalities under such general rules as will promote the prompt availability of such service to prospective users, and at the same time prevent unnecessary and uneconomic duplication of such facilities as between two (2) or more persons.

(d) Where there shall be two (2) or more persons holding certificates of convenience and necessity for similar operation in the same municipality, such operation may be carried on by such persons within their respective certificated areas and such persons shall be exempt from further application to the commission for extension of or addition to their facilities within their respective certif-

icated areas of said municipality, including any extensions of the corporate limits thereof.

When more than one utility, including co-operatives, operate within a municipality all such utilities, including co-operatives, shall be subject to rate regulation therein. Provided, further, that municipally operated utilities shall not be subject to regulation under this act.

(e) . In addition to such other rights as it may have to use the streets, alleys and public places of a municipality, a public utility which holds a certificate of public convenience and necessity granted under the provisions of this act covering the geographical area of such municipality, and which (1) is operating under a municipal franchise on the effective date of this act, or (2) shall have previously operated under such a municipal franchise which has expired within five (5) years prior to the effective date of this act, or (3) which shall hereafter operate under a municipal franchise hereafter granted, may, after the expiration of any such franchise continue to use the streets, alleys and public places therein situated upon condition that (1) such utility shall pay the said municipality compensation therefor at the rate of two per cent (2%) of said utility's gross revenues from sales to residential and commercial customers within said municipality, in case of a utility defined in section 1 D (1) and 1 D (2) and in the case of a utility defined in 1 D (3) the said utility shall pay two per cent (2%) of the monthly service charges in said municipality whether said utility has a franchise to operate therein or not, such payments to be made quarterly of each year after the effective date of this act, and (2) that after the expiration of such franchise the municipality, or any customer of such utility in such municipality, upon appropriate petition, shall be entitled to a hearing as to whether or not the certificate of convenience

and necessity may then and thereafter be granted on a permanent basis as herein set out. Any co-operative which shall operate within any area of a municipality shall likewise pay such municipality two per cent (2%) of the co-operative's gross revenue from sales to residential and commercial customers within said municipality. Any municipality shall have the right to acquire by purchase, negotiation or condemnation the facilities of any utility that is now or may hereafter be located within the corporate limits of such municipality.

(f) The commission may, after a hearing had upon due notice, make such findings as may be supported by proof as to whether any utility holding a certificate under the provisions of this act is rendering reasonably adequate service in any area covered by such utility's certificate, and in the event the commission finds that such utility is not rendering reasonably adequate service the commission may enter an order specifying in what particulars such utility has failed to render reasonably adequate service and order that such failure be corrected within a reasonable time, such time to be fixed in such order. If the utility so ordered to correct such failure fails to comply with such order of the commission and the commission finds that cancellation of its certificate would be in the best interest of the consuming public served by the holder of the certificate, its certificate for the area affected, may be revoked and cancelled by the commission.

(g) Notwithstanding any provision herein to the contrary, in any case where a utility is located and operates or proposed to locate and operate in a municipality where streets and other public places are essential to such location and operation, no certificate of convenience and necessity shall be issued thereasto without prior franchise

granted by the municipality; provided, however, such franchise shall not contain any provision conflicting with or repugnant to the exclusive jurisdiction of the commission to regulate rates and services of the utilities as herein provided. Applicants for certificates of convenience and necessity as provided for under section 5 hereof shall attach to their applications true and correct copies of franchises issued to them by such municipality as the application may embrace, and the commission is authorized so to amend such franchises as to exclude and remove therefrom any provision in conflict with or repugnant to the exclusive jurisdiction of the commission over rates and services and which shall in any way fix or affect rates. Provided, however, should any municipality arbitrarily refuse to grant a franchise or provide for an election for a franchise as provided by law to a utility now operating within said municipality within ninety (90) days after application for said franchise is made, then the utility may obtain a certificate of convenience and necessity without the necessity of first obtaining a franchise; and the said commission shall so issue said certificate of convenience and necessity upon proper showing by the utility that said franchise is being arbitrarily withheld.

In the event the commission shall rule that a franchise is being arbitrarily withheld and shall issue a certificate of necessity as hereinabove mentioned the utility obtaining said certificate of convenience and necessity shall not be required to pay to said municipality the two per cent (2%) hereinabove provided until such a franchise has been granted to said utility.

In the case of a public utility as defined in section 1 D (3) which has heretofore been under the jurisdiction of the Mississippi Public Service Commission and has its service area maps on file with the commission on the ef-

fective date of this act, under such reasonable rules and regulations as the commission shall prescribe, the commission is authorized to issue to such utility a certificate of convenience and necessity without requiring such utility to first obtain a municipal franchise as herein provided.

Section 6. *Extension of service.*—The commission may, after hearing, upon notice, by order in writing, require every public utility to establish, construct, maintain and operate any reasonable extension of its existing facilities within the certificated area upon findings and order that such extension is reasonable and practicable, and provided further, that in the case of gas and water a sufficient supply is available and obtainable therefor.

* * *

Section 22. *Decision.*—After the conclusion of a hearing the commission shall make and file its findings and order, and its opinion, if any. All findings shall be supported by substantial evidence presented in the hearing and shall be in sufficient detail to enable the court on appeal to determine the controverted questions presented by the proceeding and the basis of the commission's conclusion. A copy of such order certified under the seal of the commission, shall be served upon the person against whom it runs, or his attorney, and notice thereof shall be given to the other parties to the proceedings or their attorneys. Said order shall take effect twenty (20) days after the service thereof, unless otherwise provided, and shall continue in force, either for a period which may be designated therein or until changed or revoked by the commission. If an order cannot, in the judgment of the commission, be complied with within twenty (20) days, the commission may grant and prescribe such additional time as in its judg-

ment is reasonably necessary to comply with the order, and may, on application and for good cause shown, extend the time for compliance fixed in its order.

* * *

Section 26. *Review.*—(a) In addition to other remedies now available at law or in equity any party aggrieved by any final finding, order, or judgment of the commission, shall have the right, regardless of the amount involved, of appeal to the Chancery Court, First Judicial District of Hinds County, Mississippi. If an application for rehearing has been filed, an appeal must be filed within thirty (30) days after the application for rehearing has been refused or deemed refused because of the commission's failure to act thereon within the time specified in the preceding section or, if the application is granted, within thirty (30) days after the rendition of the decision on rehearing. If an application for rehearing has not been filed, an appeal must be filed within thirty (30) days after the entry of the commission's order. Every appeal shall state briefly the nature of the proceedings before the commission, and shall specify the order complained of. Any person whose rights may be directly affected by said appeal may appear and become a party, or the court may upon proper notice order any person to be joined as a party.

(b) Upon the filing of an appeal the clerk of the chancery court shall serve notice thereof upon the commission, whereupon the commission shall, within sixty (60) days (or within such additional time as the court may for cause allow) from the service of such notice, certify to the chancery court the record in the case, which record shall include a transcript of all testimony, together with all exhibits or copies thereof, all pleadings, proceedings, orders, findings and opinions entered in the case; provided

however, that the parties and the commission may stipulate that a specified portion only of the record shall be certified to the court as the record on appeal.

(c) No new or additional evidence shall be introduced in the chancery court but the case shall be determined upon the record and evidence transferred.

(d) The court may hear and dispose of the appeal in term time or vacation and the court may sustain or dismiss the appeal, modify or vacate the order complained of in whole or in part, as the case may be; but in case the order is wholly or partly vacated the court may also, in its discretion, remand the matter to the commission for such further proceedings, not inconsistent with the court's order as, in the opinion of the court, justice may require. The order shall not be vacated or set aside either in whole or in part, except for errors of law, unless the court finds that the order of the commission is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the commission, or violates constitutional rights.

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Section 28. *Appeals.*—Appeals in accordance with law may be had to the Supreme Court of the State of Mississippi from any final judgment of the chancery court.

If the party taking the appeal has theretofore furnished security as provided in section 27 of this act, or, in the case of an appeal from a judgment involving an order of the commission affecting rates, has filed a bond conditioned as provided in section 10 or section 27, the taking of an appeal to the Supreme Court shall operate as a supersedeas without the furnishing of further security or bond, provided, that in such cases the Supreme Court may, upon

application to it, require such additional security, or such additional bond conditioned as provided in section 10 or section 27, as in its opinion will adequately secure the other party to the appeal, or parties who may become entitled to refunds, against loss in the event the judgment under review is affirmed